IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Apellate Side

Writ Petition No.5234 of 2005

State of Maharashtra
through the Principal Secretary
Rural Development Department....Petitioner
vs
State Election Commission l& ors..Respondents

Mr.R.S.Apte wit Mr N R Bubna for petitioner
Mr.R.V.More for respondent no.l

CORAM:A.P.SHAH & D.Y.CHANDRACHUD JJ.

Dated l0.8.2005

ORAL JUDGMENT (Per A.P.Shah J.)

. Rule. The learned counsel for respondents waive service. By consent, rule is made returnable forthwith.

2. This petition is preferred by the State of Maharashtra seeking to challenge the decision of the State Election Commission refusing to postpone the election programme for village panchayats in view of heavy down pour and floods in the State. A prayer is also made to direct the Election Commission to postpone/defer the election programme for village panchayats in l3 flood affected districts of Thane, Raigad, Ratnargiri, Pune, Solapur, Satara, Sangli, Kolhapur, Nanded, Parbhani, Hingoli, Jalna and Beed for a period of 3

months or for such other period as deemed fit by this Court.

3. The term of 5783 villages panchayats in the State is expiring in the month of September 2005. The Asst Election Commissioner by his communication dated l5th July 2005 had notified the election programme for the said village panchayats. As per this programme acceptance of nomination forms was to start from lst August 2005 . By communication dated 29th July 2005 the Asst Election Commissioner informed that as per Order dated 29th July 2005 issued by the State Election Commissioner the revised election programme for the said village panchayats would start from 8th August 2005. As per the revised programme the date for publication of notice is fixed as 8th August 2005 and voting is scheduled on 28th August 2005. Due to heavy rains all over the State a number of villages, in particular the villages belonging to abovementioned l3 flood affected districts were sub-merged and large scale loss of life and property is caused. Lacs of families in the State have lost practically everything and have nobody to fend for them. Officers as well as machineries of various departments of the State are engaged in rescue and

rehabilitation work. The District Collectors of various districts therefore informed the Election Commission of the situation in the flood affected districts and requested to postpone the election programme by a period of three months. By his communication dated 4th August 2005 the Asst Election Commissioner informed that it was not possible to postpone the election programme of village panchayats and directed to requisition the government employees to ensure smooth conduct of election. The District Collectors of various districts again informed the gravity of the situation and that it was not possible to divert officers engaged in rescue work for elections and requested to postpone the election programme by a period of three months. By the impugned communication dated 7th August 2005 the Asst Election Commissioner informed that there will not be any change in the election programme already notified and the State was bound by law to make necessary staff available for election work as per the programme.It is seen from the said communication that the Election Commissioner is of the view that the completion of the election programme before l5th September 2005 is necessary and binding as per the provisions of the

Constitution and therefore no change can be made in the election programme.

4. Mr Apte, learned counsel appearing for the petitioner submits that under Article 243E(3)(b) the Election Commissioner entrusted with election work had discretion to complete the election process either before the dissolution of the panchayat or within 6 months after its dissolution. He submits that in any event in view of large scale disruption caused by the natural calamity in the State, the Election Commissioner ought to have exercised discretion vested in him by law by postponing the election so that the rehabilitation work can be completed and that in no doing so, the Election Commissioner has acted arbitrarily. Mr Apte urged that the election of the local self government cannot be given precedence over the rehabilitation work. People not having food, clothing or shelter cannot be expected to exercise their franchise. Mr.More, learned counsel appearing for respondents, on the other hand, submits that the period of panchayats is expiring in September 2005 and in view of Article 243E(3)(a) the Election Commissioner has no discretion to postpone the election . Mr.More submits that

clause (b) of Article 243E(3) on which Mr. Apte has placed reliance would apply only to cases of sooner dissolution of panchayat.

5. It is true that Article 243E(3)(a) casts a statutory duty to complete constitution of panchayat before the expiry of its duration specified in sub-clause (l) of Article 243E. However, the Election Commissioner, has apparently, overlooked the provisions of Article 243K which entrusts the work of superintendence, direction and control of conducting the elections to the panchayats in the State Election Commissioner. The provisions of Article 243K are pari materia with Article 324 and vest wide powers in the Election Commissioner to cope with unforeseen contingencies such as flood, earthquake etc or urgent situation prevailing in the State for which elections cannot be held within the time frame. Article 243K operates in areas left unoccupied by the legislation and the words 'superintendence, direction and control' as well as 'conduct of elections' are the broadest terms. It is well settled that the power of the Election Commissioner is plenary in character in exercise thereof. In statutory provisions,it is known that every

contingency could not be foreseen or anticipated with precision, therefore, the Commissioner, can cope with a situation where the field is unoccupied by issuing necessary orders.

6. The scope of Article 324 was considered by the Supreme Court in the case of Digvijay Mote vs Union of India, (l993) 4 SCC l75 and it was held that the conduct of election is in the hands of the Election Commissioner who has the power of superintendence, direction and control of elections vested in him as per Art 324 of the Constitution. Consequently if the Election Commission is of the opinion that having regard to the disturbed conditions of a State or a part thereof, free and fair elections cannot be held he may postpone the same. Accordingly it was held that on account of unsettled conditions, the election in the States of Assam and Jammu and Kashir could be postponed. It was held that this power is not unbridled and judicial review will still be permissible over the statutory body exercising its functions affecting public law rights.

7. We may also refer to the observations of the Constitution Bench in Mohinder Singh Gill vs Chief

Election Commissioner l978(l) SCC 405 wherein Krishna Iyer J, speaking for the Bench observed (pp. 43l-32 paras 38-39):

> " Article 324, which we have set out earlier is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function.It is true that Art 324 has to be read in the light of the constitutional scheme of the l950 Act and the l96l Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Art 327 the Constitution cannot shake itself free from the enacted prescriptions. After all, as Mathew J. has observed in Indira Gandhi:
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> "In the opinion of some of the judges constituting the majority in Bharati case Rule of Law is a basic structure of the Constitution apart from democracy.
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> The rule of law postulates the pervasiveness of the spirit of law throughout the whole

range of government in the sense of excluding arbitrary official action in any sphere.

And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Art 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partially but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify, less is

> insufficient to leave unsaid.Art 324, in our view operates in areas left unoccupied by legislation and the words 'superintendence,direction and control' as well as 'conduct of all elections', are the broadest terms. Myriad maybes,too mystic to be precisely presaged,may call for prompt action to reach the goal of free and fair election."
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> (emphasis supplied)

8. It is not disputed before us that heavy rains and floods have disrupted the normal life in the State. Lacs of families in the State have lost everything and do not have food, clothes shelter, medicines, and other necessities of life and have nobody to fend for them. In these circumstances, it is the duty of the State to provide such necessities to alleviate the plight of affected citizens. Therefore we find substance in the submission of State that if the the State machinery and in particular police force, revenue and rural development personnel is diverted from rehabilitation to election work,it would give rise to large scale resentment in people and will create law and order problem. Loss caused by the recent

down pour and flood is enormous and it will take some time before relief work can be completed. The Election Commissioner, however,rejected the representation of the State on erroneous assumption that he has no power to postpone election in view of the mandatory provisions of Art 243E. The Election Commissioner has failed to notice Art 243K which empowers him to postpone the elections in case of genuine supervening difficulties,for example unforeseen calamities like floods, earthquake etc. In our opinion the ends of justice would be served if the State Election Commissioner is directed to reconsider the representation made by the State for postponement of election in the light of Art 243K of the Constitution and take appropriate decision in accordance with law within a period of two weeks from today. We order accordingly. The election programme declared by the State Election Commissioner in respect of abovementioned l3 flood affected districts is quashed and set aside. Rule is made absolute accordingly with no order as to costs.